

DAVID H. KRAMER, State Bar No. 168452  
 COLLEEN BAL, State Bar No. 167637  
 LISA A. DAVIS, State Bar No. 179854  
 BART E. VOLKMER, State Bar No. 223732  
 WILSON SONSINI GOODRICH & ROSATI  
 Professional Corporation  
 650 Page Mill Road  
 Palo Alto, CA 94304-1050  
 Telephone: (650) 493-9300  
 Facsimile: (650) 565-5100  
 DKramer@wsgr.com

JONATHAN M. JACOBSON  
 WILSON SONSINI GOODRICH & ROSATI  
 Professional Corporation  
 12 East 49th Street, 30th Floor  
 New York, NY 10017-8203  
 Telephone: (212) 999-5800  
 Facsimile: (212) 999-5899  
 JJacobson@wsgr.com

Attorneys for Defendant  
 Google Inc.

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

KINDERSTART.COM, LLC, a California  
 limited liability company, on behalf of itself  
 and all others similarly situated,

Plaintiffs,

v.

GOOGLE INC., a Delaware corporation,  
 Defendant.

CASE NO.: C 06-2057 JF (RS)

**GOOGLE INC.'S OPPOSITION TO  
 KINDERSTART'S ADMINISTRATIVE  
 REQUEST UNDER CIVIL L.R. 7-11  
 REGARDING SCHEDULING, CASE  
 MANAGEMENT, AND PROPOSED  
 SECOND AMENDED COMPLAINT**

Before: Hon. Jeremy Fogel  
 Courtroom: 5th Floor, Room 3

1 **I. INTRODUCTION**

2 KinderStart's Motion for Administrative Relief asks the Court to permit it to file a  
 3 Second Amended Complaint ("SAC") 85 days after the Court's order dismissing its First  
 4 Amended Complaint ("FAC") and 98 days after the Court alerted KinderStart that its FAC was  
 5 infirm. KinderStart has not articulated any compelling reason why it should be permitted such a  
 6 lengthy time to file its SAC. Indeed, the Court presumed that KinderStart would file a SAC and  
 7 that a motion to dismiss the SAC would be fully briefed for a hearing on September 29, 2006.  
 8 KinderStart asks to postpone even *filing* its SAC until a week after that date.

9 Given the nature of KinderStart's allegations and public statements that KinderStart and  
 10 its attorney have made about this case, Google seeks to have the pleadings in this matter resolved  
 11 expeditiously. Accordingly, Google respectfully asks the Court to require KinderStart to file its  
 12 SAC by August 11, 2006 and to schedule a hearing on Google's motion to dismiss the SAC for  
 13 October 6, 2006.

14 **II. FACTUAL BACKGROUND**

15 KinderStart filed its original complaint on March 17, 2006 but elected not to serve it. On  
 16 April 12, 2006, KinderStart filed and served its FAC. On April 13, 2006, counsel for Google  
 17 requested a 20 day extension of time to file its motion to dismiss the FAC based on scheduling  
 18 conflicts. Volkmer Decl., Ex. A. Counsel for KinderStart refused Google's request for even that  
 19 modest extension:

20 Plaintiffs decline Defendant's request to extend by 20 days the deadline to  
 21 respond or answer. As you know, Defendant saw the initial 3/17/06 filed  
 22 Complaint as early as March 20. I am very mindful of personal sacrifices clients  
 23 and counsel must make from time to time, and I've already done so many  
 weekends in this matter. Timing is absolutely critical to our side and I would  
 expect that of Google as well.

24 Volkmer Decl., Ex. B. Google thus timely filed its motion to dismiss the FAC and an  
 25 anti-SLAPP motion to strike certain claims for relief on May 2, 2006.

26 At the June 30, 2006 hearing on those motions, the Court made clear that most if  
 27 not all of the FAC would be dismissed with leave to amend: "So the bottom line is I think  
 28 all of the claims with the possible exception of the defamation claim lack a certain degree

1 of specificity or they lack essential elements, and my question is what additionally  
 2 KinderStart could allege given an opportunity to amend . . . .” Doc. No. 40 at 6:7-12.  
 3 The Court also indicated that further motions directed to the pleadings would be heard on  
 4 September 29, 2006 and that a Case Management Conference would also be set for that  
 5 date. *Id.* at 43-44. On July 13, 2006, the Court formally dismissed all of KinderStart’s  
 6 claims. Doc. No. 42. The Court did not provide a specific deadline by which KinderStart  
 7 was required to file its SAC. *Id.* According to a media report, counsel for KinderStart  
 8 “claimed victory” after the Court’s ruling because the FAC was dismissed without  
 9 prejudice and stated that KinderStart intended to file an amended complaint before the  
 10 September 29, 2006 court date. Volkmer Decl., Ex. C [July 13, 2006 C-NET article].  
 11 Counsel for KinderStart also encouraged other website publishers to contact him  
 12 regarding the prospect of bringing similar claims of their own. *Id.*

13 On July 20, 2006 and August 1, 2006, counsel for Google inquired as to when and  
 14 if KinderStart intended to file a SAC. Volkmer Decl., Ex. D. On August 2, 2006,  
 15 counsel for KinderStart responded with the following cryptic message: “Plaintiffs are  
 16 monitoring a number of developments. I will advise you when a next step is taken.”  
 17 Volkmer Decl., Ex. E. Counsel for Google responded: “[W]e’re flexible with respect to a  
 18 schedule, but we have to know what you intend to do. If you do not intend to file an  
 19 amendment or have other plans, please let me know.” *Id.* On August 3, 2006, counsel  
 20 for KinderStart offered the following schedule:

21	<b>Filing of SAC</b>	10/06/06
22	<b>Google’s Motion to Dismiss</b>	11/10/06
23	<b>KinderStart’s Opposition</b>	12/01/06
24	<b>Google’s Reply</b>	12/15/06
25	<b>Court Hearing</b>	12/22/06

26 Volkmer Decl. at ¶7. For a number of reasons, including that the proposal did not  
 27 comply with the deadlines for filing briefs under the local rules, Google rejected  
 28

1 KinderStart's proposal. KinderStart then filed the instant Motion for Administrative  
2 Relief.

### 3 **III. ARGUMENT**

#### 4 **Case Schedule**

5 Given that KinderStart has already had more than three weeks since the Court dismissed  
6 its claims (five weeks since the Court announced its intention to do so), Google proposes the  
7 following schedule for the filing of the SAC and motions related to that pleading:

8 **August 11, 2006:** KinderStart files SAC

9 **September 1, 2006:** Google files motion(s) directed to the SAC

10 **September 15, 2006:** KinderStart's opposition due

11 **September 22, 2006:** Google's reply due

12 **October 6, 2006:** Hearing on motion(s) directed to the SAC

13 Google's proposed schedule is far more reasonable than KinderStart's and far closer to the  
14 timeframe originally envisioned by the Court, which set a hearing on motions related to the SAC  
15 for September 29, 2006. Google's proposal provides KinderStart with 29 days from the Order  
16 dismissing the FAC to file the SAC, in contrast to the 85 days sought by KinderStart. Google  
17 wishes to have the pleadings in this case resolved in an expeditious manner given the comments  
18 of KinderStart and its counsel to the press pertaining to this case.

19 For its part, KinderStart has not made a showing of good cause for an entitlement to 85  
20 days to draft and file the SAC. To support its request, KinderStart's counsel offers the  
21 following:

- 22 • Counsel received "information" concerning "various penalty practices" of  
23 Google on June 20, 2006;
- 24 • Counsel received "information" from "a Bay Area marketing executive"  
25 regarding Google's search results on July 14, 2006;
- 26 • A July 6, 2006 "FOIA-type" request from a "federal agency" is set for a  
27 response on August 11, 2006;
- 28 • A "witness in the Northeast United States" who allegedly has "information on  
affected Websites" has been "reached by Plaintiffs' investigator."

1 Yu Decl. ISO Admin Request, ¶ 3. These allegations are immaterial to the date by which  
 2 KinderStart should be required to file its SAC. First, they are exceedingly vague (perhaps  
 3 intentionally so). Second, KinderStart has not identified any nexus between these allegations  
 4 and the putative claims of the SAC (and Google can think of none). Third, and most  
 5 importantly, they betray a misunderstanding of the pleading rules applicable in federal cases.  
 6 Plaintiff was required to have conducted a good faith investigation before bringing suit. *See* Fed.  
 7 R. Civ. P. 11. If the facts alleged are deemed insufficient to support a complaint, as here, the  
 8 plaintiff should bolster the complaint with further facts in its possession that could support the  
 9 claims asserted, not engage in a three month “due diligence” campaign to uncover new facts to  
 10 support new claims. *Cf.* June 30, 2006 Hearing Tr. at 12:3-11 (Doc. No. 40) (“the way litigation  
 11 works is you can’t just file a blanket lawsuit saying we think we’re going to find some stuff and  
 12 we want to take discovery. You have to have a good faith basis for asserting the claim and you  
 13 have to articulate what that claim is, and then if you find things in discovery that you didn’t  
 14 expect or you get more specificity than you had before, you can amend your complaint.”).

15 KinderStart must live with the claims asserted in its FAC and the current procedural  
 16 posture of this case. The 29 day period to file the SAC under Google’s proposal is more than  
 17 reasonable under the circumstances, and is more than this Court has typically granted following  
 18 successful motions to dismiss. *See, e.g.,* Cal. Rule of Court 325(e) (plaintiffs are provided 10  
 19 days to file an amended complaint after a demurrer is sustained unless otherwise ordered); *Xerox*  
 20 *Corp. v. Far Western Graphics, Inc.*, Case No. 03-4059 JF, 2004 WL 2271587 (N.D. Cal. 2004)  
 21 (permitting 20 days to file amended complaint after dismissal without prejudice); *Towantic*  
 22 *Energy, L.L.C. v. General Elec. Co.*, Case No. 04-00446 JF, 2004 WL 1737254 (N.D. Cal. 2004)  
 23 (same).

#### 24 **Amendment of First Amendment Claim**

25 Google defers to the Court on KinderStart’s request for clarification regarding whether it  
 26 should be permitted to amend its First Amendment and Free Speech claims. As Google  
 27 explained in its earlier motion, Google does not believe that KinderStart can plead facts  
 28 consistent with Rule 11 to state a First Amendment or Free Speech claim.

1           **Case Management Conference**

2           Google agrees that the Case Management Conference currently scheduled for September  
3 29, 2006 should be continued. However, Google believes that a Case Management Conference  
4 should be *set* at the hearing on Google's Motion to Dismiss the SAC. Google does not believe  
5 that it would be productive to *hold* a Case Management Conference on that date because the  
6 pleadings will not be resolved at that time. Google believes that the parties should meet and  
7 confer related to case management once the operative claims, if any, have been pled.

8           **III. CONCLUSION**

9           Google respectfully requests that the Court enter its proposed schedule and order that a  
10 Case Management Conference be set at the hearing on its motion to dismiss the SAC.

11  
12 Dated: August 7, 2006

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

13  
14 By: /s/ David H. Kramer  
David H. Kramer

15  
16 Attorneys for Defendant  
Google Inc.